

TEXAS  
COMMISSION  
ON ENVIRONMENTAL  
QUALITY

TCEQ DOCKET NO. 2009-0680-AGR

2009 JUL 28 PM 4: 57

Application by Cottonwood Auction  
Barn, LLC to renew TPDES Permit No.  
WQ0004136000

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BEFORE THE CLERKS OFFICE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

**DR. PRITCHY SMITH AND PARC SMITH'S REPLY TO RESPONSES TO  
HEARING REQUESTS**

TO THE HONORABLE COMMISSIONERS OF THE TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY:

Cottonwood Auction Barn, LLC ("Applicant") submitted an application to renew  
its Texas Pollution Discharge Elimination System Permit No. WQ0004136000. For the  
following reasons, Dr. Pritchly Smith and Parch Smith respectfully request that the  
Commission grant their requests for a contested case hearing.

**I. RIGHT TO HEARING**

The current permit is issued under the authority of Texas Water Code Chapter 26  
which promulgates that a permit application is subject to a contested case hearing if the  
new permit will either (1) increase significantly the quantity of waste authorized to be  
discharged; or (2) change materially the pattern or place of discharge.<sup>1</sup>

The proposed permit will increase the quantity of waste authorized to be  
discharged. Applicant has requested that the volumetric capacity of the retention control  
structures will be increased from 2.46 acre-feet to 4.94 acre-feet, a 50% increase.<sup>2</sup>  
Because the permit authorizes the discharge of the contents of these structures during a  
rainfall event, this volumetric increase of the quantity of water within the structures  
increases the quantity of wastewater permitted to be discharged. The proposed permit, as

<sup>1</sup> TEX. WATER CODE § 26.028(d)(1).

<sup>2</sup> Draft Permit, Special Provision X.A. at p. 27.

a result of the increase in waste allowed to be maintained, the proposed permit authorizes a change in the pattern and place of discharge.

The ED's brief indicates that so long as the commission finds that the amended permit will maintain or improve the quality of waste discharge, no right to a contested case hearing exists.<sup>3</sup> While the Executive Director claims that the *quality* of the waste will be maintained, the ED's response has not disputed that the *quantity* of the authorized discharge from the retention control structures has been increased.

Regardless of what the Commission determines with respect to whether the new permit will improve or maintain the quality of the waste discharged, if it is true that either the *quantity* of the discharge is changed, or that the *pattern* of the discharge is changed, the right to a hearing exists.<sup>4</sup>

For these reasons, Requestors believe that the right to a contested case hearing exists with regard to the immediate application.

## II. STANDING

The Executive Director properly recognized Dr. Pritchey Smith as an affected person, but failed to recognize the recreational interests of Requestor Parc Smith. Parc Smith and his family have historically used the creek for hiking, camping and fishing.

Recreational interests, even without an associated property right, are adequate to demonstrate a "justiciable interest." In the case of *Texas Rivers Protection Association et al. v. Texas Natural Resource Conservation Commission*, the Austin Court of Appeals considered whether parties protesting the issuance of a water rights permit had standing

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<sup>3</sup> ED's Response at p. 3.

<sup>4</sup> Tex. Water Code § 26.028(d).

before the TNRCC.<sup>5</sup> The members of Texas Rivers Protection Association (TRPA) owned property fronting the affected parts of the river, and testified that granting of the permit would injure their aesthetic and recreational interests in the river.<sup>6</sup> The permit applicant complained that the protestants in the case had no "vested" rights that would be impacted, but the court rejected this argument.<sup>7</sup> The Court of Appeals instead noted that, "An injury need not affect 'vested' property rights to confer standing; the harm may be economic, recreational or environmental."<sup>8</sup> The status of recreational interests as a justiciable interest adequate to justify *judicial standing* has been repeatedly affirmed by the Texas courts.<sup>9</sup> The federal courts have repeatedly treated a recreational interest alone as sufficient to demonstrate standing.<sup>10</sup>

### III. DURATION OF HEARING

Requestors agree with the ED's recommendation that the duration for the contested case hearing span a period of nine months.

<sup>5</sup> *Texas Rivers Protection Association et al. v. Texas Natural Resource Conservation Commission et al.*, 910 S.W.2d 147, 151 (Tex. App. – Austin, 1995, writ denied).

<sup>6</sup> *Texas Rivers Protection Association et al. v. Texas Natural Resource Conservation Commission et al.*, at p. 151.

<sup>7</sup> *Id.*

<sup>8</sup> *TRPA 151-152*, citing *City of Bells v. Greater Texoma Utility Authority*, 790 S.W.2d 6, 11 (Tex. App. – Dallas 1990, writ denied).

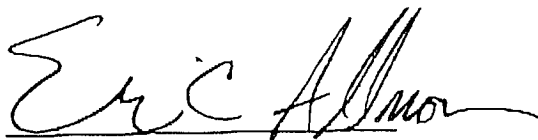
<sup>9</sup> See, e.g.: *TRPA; Dennis Nausler and Nausler Investments, L.L.C. v. Coors Brewing Co. and Golden Distributing Enterprises, L.P.*, 170 S.W.3d 242, 248 (Tex. App. – Dallas 2005 no writ); *Cornyn v. Fifty-Two Members of the Schoppa Family*, 70 S.W.3d 895, 900 (Tex. App. – Amarillo 2001 no writ); *City of Bells v. Greater Texoma Utility Authority*, 790 S.W.2d 6, 11 (Tex. App. – Dallas 1990, writ denied); *Billy B. v. Board of Trustees of the Galveston Wharves, et al.*, 717 S.W.2d 156 (Tex. App. – Houston [1<sup>st</sup>] 1986 no writ); *Super Wash, Inc. v. City of White Settlement*, 131 S.W.3d 249, 255 (Tex. App. – Fort Worth 2004 pet. granted); *Polaris Industries, Inc. et al. v. Larry McDonald*, 119 S.W.3d 331 (Tex. App. – Tyler 2003 no writ); *Assoc. Gen. Contractors, Inc. v. City of Corpus Christi*, 694 S.W.2d 581, 581-82 (Tex. App. – Corpus Christi 1985, no writ).

<sup>10</sup> See, e.g.: *Lujan v. National Wildlife Federation*, 497 U.S. 871 (U.S. 1990); *Friends of the Earth Inc., et al. v. Laidlaw Environmental Services (TOC), Inc.*, 582 U.S. 167, 180 (U.S. 2000); *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 556 (5<sup>th</sup> Cir. 1996) (Standing demonstrated by members who used Galveston Bay for various recreational activities, including swimming, canoeing, and bird watching.)

**PRAYER**

For the reasons set forth above, Dr. Pritch Smith and Parch Smith respectfully request that the Commission grant their requests for a contested case hearing, hold a hearing on each issue addressed in their hearing request, and that the duration of the hearing be specified as 9 months from the preliminary hearing to the issuance of the proposal for decision.

Respectfully submitted,



Eric Allmon  
State Bar No. 24031819  
Lowerre & Frederick  
707 Rio Grande, Suite 200  
Austin, TX 78701  
(512) 482-9345; (512) 482-9346 fax

# CERTIFICATE OF SERVICE

By my signature, above, I, Eric Allmon, certify that on July 28, 2009, an original and seven copies of the forgoing document was served upon the Chief Clerk of the TCEQ, and true and correct copies were served by facsimile on the following party representatives via US mail, postage prepaid.

Larry Gibson  
Cottonwood Auction Barn, LLC  
9862 E. State Highway 6  
Dublin, Texas 76446-5327

J. Baker  
Lowther Consulting, Inc.  
PO Box 78  
Dublin, Texas 76446

James Murphy  
Office of Public Interest Counsel, MC-103  
Texas Commission on Environmental  
Quality  
P.O. Box 13087  
Austin, Texas 78711-2087

Alicia Lee  
Environmental Law Division, MC-173  
Texas Commission on Environmental  
Quality  
P.O. Box 13097  
Austin, Texas 78711-3087

Jamie Saladiner  
Texas Commission on Environmental  
Quality  
Office of the Chief Clerk, MC-150  
P.O. Box 13097  
Austin, Texas 78711-3087

Bridget Bohac  
Texas Commission on Environmental  
Quality  
Office of the Chief Clerk, MC-108  
P.O. Box 13097  
Austin, Texas 78711-3087

Kyle Lucas  
Texas Commission on Environmental  
Quality  
Office of the Chief Clerk, MC-222  
P.O. Box 13097  
Austin, Texas 78711-3087

LaDonna Castañuela  
Texas Commission on Environmental  
Quality  
Office of the Chief Clerk, MC-105  
P.O. Box 13097  
Austin, Texas 78711-3087

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COMMISSION  
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CHIEF CLERKS OFFICE

**Lowerre, Frederick, Perales,  
Allmon, & Rockwell**

707 Rio Grand, Suite 200  
Austin, TX 78701  
(512) 469-6000 Phone  
(512) 482-9346 FAX

**FAX COVER SHEET**

**To:**

**Ms. LaDonna Castañuela**

**Fax: 512.239.3311**

**Ms. Alicia Lee, Staff Attorney**

**Fax: 512.239.0606**

**Ms. Bridget Bohac, Director**

**Fax: 512.239.4007**

**Mr. James Murphy, Jr., Attorney**

**Fax: 512.239.6377**

**From: Eric Allmon**

**Date: July 28, 2009**

**CHIEF CLERKS OFFICE**

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